



Note

U.C.C. Section 2-725: A Statute Uncertain in Application and Effect

I. INTRODUCTION

Section 2-725 of the Uniform Commercial Code provides the statute of limitations for suits involving contracts for the sale of goods.¹ Under section 2-725, an action must be brought within four years after the cause of action has accrued.² A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.³ Generally, a breach of warranty occurs when tender of delivery⁴ is made.⁵ The exception to this general rule is that "where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."⁶ Simply stated, the four-year period will begin to run either on the date of tender of delivery (date-of-delivery rule), or on the date on which the breach is or should have been discovered (date-of-discovery rule), depending on whether the warranty is classified as one that extends to future performance.

Despite its apparent simplicity, section 2-725 can cause unfair results. If the date-of-delivery rule is applied, a purchaser of a defective product may discover that the statute of limitations has expired before the defect is discovered. On the other hand, if the date-of-discovery rule is applied, a seller may be forced to defend against a breach of warranty claim many years after the sale occurred, and long after the records of the sale have been destroyed. Section 2-725 attempts to achieve fair results by asking whether a warranty "explicitly extends to future performance."⁷ Unfortunately, the Code's attempt at fairness fails because the test is unwieldy and susceptible to

1. U.C.C. § 2-725 (1978) provides:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limit and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

2. *Id.* § 2-725(1).

3. *Id.* § 2-725(2).

4. U.C.C. § 2-503(1) provides that "(t)ender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery." Courts have held that for purposes of § 2-725, the goods do not have to be conforming goods to constitute a tender of delivery. *See, e.g., NLRB v. Bear Archery*, 587 F.2d 813, 819 (6th Cir. 1978).

5. U.C.C. § 2-725(2) (1978).

6. *Id.*

7. *Id.*

conflicting interpretations. This Note will propose an amended version of section 2-725 designed to alleviate these problems.

Two principal problems have arisen from the language of section 2-725. The first stems from the fact that section 2-725 offers no guidance on when a warranty "explicitly extends to future performance."⁸ Since each court faced with interpreting a warranty must resolve this question on its own, predictably, even a cursory review of the case law discloses inconsistent and often irreconcilable decisions.⁹ One reason for the inconsistent decisions is the seemingly harsh result that a statute of limitations works on plaintiffs in cutting off their causes of action before an injury is discovered.¹⁰ To avoid this harsh result, some courts have manipulated section 2-725 by varying the requirements for future performance warranties. Other courts have simply held section 2-725 inapplicable. As one commentary points out, "(s)ection 2-725 offers a sane and workable statutory scheme, but it is one the courts will infrequently follow when the plaintiff's blood has been spilled."¹¹

A second problem concerns the applicability of section 2-725. This problem is caused by the intersection of strict product liability and warranty liability.¹² Persons who are injured by a defective product can sue in tort under a product liability theory, or in contract in a breach of warranty action. Tort statutes of limitations generally do not begin to run until the date of injury.¹³ A court that wishes to extend an injured plaintiff's contract action may apply the tort statute of limitations over section 2-725.¹⁴ This clearly contradicts section 2-725's mandate that it applies to "an action for breach of any contract for sale"¹⁵ and prevents the uniformity that the Code seeks to achieve.¹⁶

The confusion that has resulted over choosing the applicable statute of limitations was emphatically illustrated by *Val Decker Packing Co. v. Corn Products Sales Co.*,¹⁷ a Sixth Circuit Court of Appeals decision. The case involved an action for damages for breach of an implied warranty in a sale of goods.¹⁸ The issue on appeal was the applicable Ohio statute of limitations.¹⁹ Neither party had even addressed the possibility that section 2-725 might apply.²⁰ The defendant contended that the tort

8. *Id.*

9. For cases construing § 2-725(2), see U.C.C. Case Dig. ¶ 2725.21 (1981 and 1985). For cases which hold that the future performance exception does apply, see *Ferguson v. Sturm, Ruger & Co.*, 524 F. Supp. 1042 (D. Conn. 1981); *Glen Peck, Ltd. v. Fritsche*, 651 P.2d 414 (Colo. App. 1982); *Iowa Mfg. Co. v. Joy Mfg. Co.*, 669 P.2d 1057 (Mont. 1983); *Moore v. Puget Sound Plywood, Inc.*, 214 Neb. 14, 332 N.W.2d 212 (1983); *Rochester Welding Supply Corp. v. Burroughs Corp.*, 78 A.D.2d 983, 433 N.Y.S.2d 888 (1980).

For cases which hold that the future performance exception does not apply see *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980); *Chicago Heights Venture v. Dynamit Nobel of America, Inc.*, 575 F. Supp. 214 (N.D. Ill. 1983); *LaPorte v. R.D. Werner Co.*, 561 F. Supp. 189 (N.D. Ill. 1983); *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

10. 3 W. HAWKLAND, U.C.C. SERIES § 2-725:02, at 479 (Callaghan 1982).

11. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 11-9, at 420 (1980).

12. *Id.* at 415.

13. *Id.* at 416.

14. See *Witherspoon v. General Motors Corp.*, 535 F. Supp. 432 (W.D. Mo. 1982) (the tort statute of limitations applied to implied warranty claims involving personal injuries that were tortious in nature).

15. U.C.C. § 2-725(1) (1978).

16. See *infra* text accompanying notes 23-24.

17. 411 F.2d 850 (6th Cir. 1969).

18. *Id.*

19. *Id.*

20. *Id.* at 851.

statute should apply, whereas the plaintiff argued for the fifteen-year written contract statute.²¹ Only after counsel were granted additional time to research this issue was it determined that section 2-725 was controlling.²²

This Note will begin its analysis of section 2-725 by examining the purposes the section seeks to achieve. The needs of buyers and sellers of goods will be identified in order to determine if they are currently being met by section 2-725. Next, the cases interpreting the future performance exception and the confusion surrounding the choice of the applicable statute of limitations will be analyzed. That analysis will illustrate the flaws in the current version of section 2-725. Finally, a proposal to amend section 2-725 will be presented and examined to determine whether it fulfills the purposes of section 2-725 and whether it meets the needs of buyers and sellers of goods.

II. THE PURPOSE OF SECTION 2-725

"The underlying purpose of the Uniform Commercial Code is to 'simplify, clarify, and modernize the law governing commercial transactions . . . and to make uniform the law among the various jurisdictions.'"²³ Therefore, if an Ohio court classifies a warranty as a prospective warranty,²⁴ and a California court classifies the same warranty as a present warranty, one of the primary purposes behind the Uniform Commercial Code is not being fulfilled.

One reason for having a statute of limitations is to provide a period of time after which sellers can destroy sales records and put their minds at ease regarding possible claims from defective products.²⁵ A statute of limitations attempts to prevent the assertion of stale claims. As time passes, witnesses die or move away, memories fade, and documents are lost. A statute of limitations is arbitrary; rather than dividing meritorious claims from nonmeritorious ones,²⁶ it establishes a length of time after which a claim cannot be brought.²⁷ Because of its arbitrary nature, sometimes a statute of limitations will appear to cause injustice by preventing a valid claim from being asserted. It is hoped that the disadvantages resulting from cutting off a few good claims will be outweighed by the benefits that are derived from preventing stale claims.²⁸ By adopting section 2-725 and other statutes of limitations, state legislatures have tacitly accepted this theory. For a court to manipulate a statute of limitations in order to avoid what it thinks would be a harsh result ignores the legislature's command. Furthermore, if one accepts the argument that trying stale

21. *Id.* at 850-51.

22. *Id.*

23. U.C.C. § 1-102(2)(a), (c), quoted in Schmitt & Hanko, *For Whom the Bell Tolls—An Interpretation of the UCC's Exception as to Accrual of a Cause of Action for Future Performance Warranties*, 28 ARK. L. REV. 311 (1974).

24. As used in this Note, a "prospective warranty" is one that explicitly extends to future performance. Thus, the date-of-discovery rule will be applied to prospective warranties. "Present warranties" do not extend to future performance, and the date-of-delivery rule will be applied to them.

25. 3 W. HAWKLAND, *supra* note 10, at 479.

26. See generally T. QUINN, U.C.C. COMMENTARY AND LAW DIGEST ¶ 2-725(A), at 2-513 (1978).

27. *Id.*

28. See Schmitt & Hanko, *supra* note 23, at 329.

cases will often lead to bad results, then the court may be causing an injustice rather than preventing it.

It is apparent that section 2-725 has been drafted with these concerns in mind. Subsection 2-725(2) provides the general rule that the four-year period begins to run when tender of delivery is made "regardless of the aggrieved party's lack of knowledge of the breach."²⁹ It is clearly within the drafters' intention to allow a claim for breach of warranty to be barred even before the purchaser learns that the warranty has been breached.³⁰ While this appears to be a harsh result, it emphasizes the importance that the drafters of section 2-725 attached to the above-described policies underlying statutes of limitations. Despite this importance, the drafters created an exception to the usual four-year period for future performance warranties. This exception recognizes the existence of some interest which outweighs the policies behind the statute of limitations.³¹ One important interest protected by the exception is the freedom of parties to contract as they see fit.³² For example, by giving a warranty which explicitly extends to future performance, a seller is agreeing to extend the normal period that a buyer would be allowed to bring an action for breach of warranty. A court should extend this period only because the parties have contracted to extend the period, not merely because the court feels that a buyer has been injured. To do otherwise would be to ignore the importance the drafters of section 2-725 and the legislatures have implicitly placed on the purpose of the statute of limitations. The requirement that the warranty *explicitly* extend to future performance before the date-of-discovery rule is applied can be used to support the above reasoning. The additional requirement of explicit language narrows the exception so that fewer cases will come within the exception.³³ This shows the importance that is placed on the general rule without limiting in any way the freedom of the parties to extend the period contractually should they so desire.

III. THE COMMERCIAL EXIGENCIES OF BUYERS AND SELLERS

A commercial code is intended to provide a legal framework for doing business.³⁴ Therefore, before it is included in a commercial code, a statute should be examined to ensure that it meets the economic needs of buyers and sellers. A buyer of a product wants to receive what he or she has bargained for. If a product is defective and the seller refuses to correct the problem, the legal system should be available to protect the buyer's expectation interest.³⁵ Two reasons for having a statute of limitations can be easily identified. The need for a seller to be able to destroy records and plan ahead without fear of lawsuits arising out of the distant past has been

29. U.C.C. § 2-725(2) (1978).

30. 3 W. HAWKLAND, *supra* note 10, at 479.

31. See *supra* text accompanying notes 23-25.

32. U.C.C. § 1-102(3) (1978) provides that "(t)he effect of provisions of this Act may be varied by agreement" Thus, the U.C.C. places great importance on the principle of freedom of contract.

33. 3 W. HAWKLAND, *supra* note 10, at 480.

34. See U.C.C. § 1-102(2)(a) (1978).

35. Expectation interest refers to the value of the benefit a party would have received from the contract if the defendant had not breached the contract, but had completed performance as agreed.

discussed above. The other reason relates to matters of proof in a defective product case. The longer the period of time between the sale of the product and the discovery of a defect, the more likely it is that the "defect" is actually the result of misuse of the product by the buyer, rather than a problem originating with the seller.³⁶ Section 2-725 voices the principle that four years is a sufficient period of time in which to discover latent defects.

Buyers may be heard to complain that a warranty is of no value if the statute of limitations is allowed to expire before there is any way of learning that the warranty has been breached. Sellers, however, can argue in response that this argument ignores the fact that the buyer was provided protection for four years. If buyers desire more protection than this, they can achieve it by contracting for a future performance warranty under which the four-year period will not begin to run until the breach is discovered. Of course, this extra protection will only be provided at an additional cost to the buyer. Future performance warranties are usually negotiated items between buyers and sellers. Courts should only construe a warranty to be a future performance warranty if the parties bargained for it. To do otherwise is to provide a windfall to one party at the expense of the other.

IV. THE FUTURE PERFORMANCE DILEMMA

One of the unfortunate features of section 2-725 is that no guidance is provided to determine what is meant by the words "explicitly extends to future performance."³⁷ Consequently, courts have been left largely on their own to puzzle out this problem. The results have been unsatisfactory.³⁸ One of the purposes of this Note is to demonstrate that these problems can best be corrected by a revision of section 2-725. However, in recognition of the fact that change can be a slow process, this Note will attempt to suggest a framework of analysis that might prove helpful to courts in interpreting this ambiguous section.

A. A Closer Look at Subsection 2-725(2)

Before reviewing cases that have interpreted section 2-725, it is helpful to note what others have said about the section. At least two commentators find the case law surrounding section 2-725 confusing. They conclude that "liberal judicial construction . . . has . . . resulted in a muddying of the waters of interpretation. No one can safely predict when—and for whom—the bell tolls."³⁹ One student author claims that section 2-725 will not protect the reasonable expectations of the purchaser.⁴⁰ Specifically, he refers to the situation in which a buyer's claim has been

36. MODEL UNIFORM PRODUCT LIABILITY ACT, analysis of § 110(B)(1), 44 Fed. Reg. 62, 714 (proposed October 31, 1979).

37. U.C.C. § 2-725(2) (1978).

38. See *infra* text accompanying notes 56-82.

39. Schmitt & Hanko, *supra* note 23, at 330.

40. Note, *The Code Giveth and the Code Taketh Away: Implied Warranties and the Statute of Limitations*, 41 U. PITT. L. REV. 783 (1980).

barred before a defect is discovered.⁴¹ To correct the problem, he proposes deletion of the word "explicitly" from subsection 2-725(2) and allowing the date-of-discovery rule to be applied to certain implied warranties.⁴² This is a logical approach since the overwhelming weight of authority, as stated by the Fifth Circuit Court of Appeals, is that "an implied warranty by its nature cannot 'explicitly extend to future performance.'" ⁴³

In order to fall within the future performance exception in subsection 2-725(2) and thus subject to the date-of-discovery rule, an action must meet two tests. First, the warranty at issue must explicitly extend to future performance.⁴⁴ Second, the "discovery of the breach must await the time of such performance."⁴⁵ This second test, if applied literally, would mean that if the purchaser *could* (not should) have discovered the breach upon delivery, then the date-of-delivery rule would be applied. Applying this test consistently could greatly reduce the number of cases that fall within the future performance exception since it is often *possible* to discover a latent defect. Although not necessary to the court's holding, in *Lawson v. London Arts Group*,⁴⁶ an action based on Michigan's warranty in fine arts statute, the Sixth Circuit Court of Appeals recently explained how this test might be applied:

Assuming without deciding that the defendant's warranty extended to future performance, the statute also requires that discovery of the breach *must* await the time of such performance. This is not the situation here. Although the plaintiff reasonably may not have suspected the breach of warranty until 1976, it would not have been impossible for her to have discovered the breach earlier. Consequently, this discovery did not necessarily have to await the [product's] future "performance."⁴⁷

Application of this second test could offer the courts a way to turn back recent expansions of the future performance exception while still using the current version of subsection 2-725(2).

The converse of this second test has often caused expansion of the future performance exception. In other words, courts will apply the date-of-discovery rule any time the breach could not have been discovered at the time of delivery, regardless whether the warranty *explicitly* extends to future performance.⁴⁸ This practice was criticized in *Binkley Co. v. Teledyne Mid-America Corp.*⁴⁹ *Binkley Co.* involved an action for breach of a warranty that a welding device would meet certain specifica-

41. *Id.*

42. *Id.* at 798.

43. *Clark v. Delaval Separator Corp.*, 639 F.2d 1320, 1325 (5th Cir. 1981) (citing *General Motors Corp. v. Tate*, 257 Ark. 347, 516 S.W.2d 602, 606 (1974); *Everhart v. Rich's Inc.*, 128 Ga. App. 319, 196 S.E.2d 475 (1973); *Voth v. Chrysler Motor Corp.*, 218 Kan. 644, 545 P.2d 371 (1976); *Wilson v. Massey-Ferguson, Inc.*, 21 Ill. App. 3d 867, 315 N.E.2d 580 (1974); *Holdridge v. Heyer-Schulte Corp. of Santa Barbara*, 440 F. Supp. 1088 (N.D.N.Y. 1977); *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 820 (6th Cir. 1978); *Continental Oil Co. v. General Am. Transp. Co.*, 409 F. Supp. 288 (S.D. Tex. 1976) (citing Oklahoma law); see also *J. WHITE & R. SUMMERS*, *supra* note 11.

44. U.C.C. § 2-725(2) (1978).

45. *Id.*

46. 708 F.2d 226 (6th Cir. 1983).

47. *Id.* at 228 (emphasis in original).

48. See, e.g., *Perry v. Augustine*, 37 Pa. D. & C.2d 416 (C.P. Mercer Co. 1965).

49. 333 F. Supp. 1183 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. 1972).

tions.⁵⁰ The plaintiff argued that the future performance exception should apply since a determination of the device's capabilities could not be made at the time of delivery, but instead had to wait until installation was complete.⁵¹ The court rejected this argument, holding that to construe "warranties made without explicit reference to time" as future performance warranties would "directly conflict with § 2-725(2)."⁵²

One type of warranty that generally is not within the future performance exception is a repair or replacement warranty.⁵³ As explained in *Ontario Hydro v. Zallea Systems, Inc.*,⁵⁴ a "repair or replacement warranty merely provides a *remedy* if the product becomes defective, while a warranty for future performance *guarantees the performance* of the product itself for a stated period of time."⁵⁵ Thus, it appears that if a seller only promises to fix a product when it breaks down, then the seller's only liability will be to fix the product.

B. The Cases

After describing examples that do not, or should not, fit within the future performance exception, it may be helpful to describe what does qualify for the exception. "A careful reading of subsection 2-725(2) . . . makes it plain that the exception is a narrow one. . . . The exception . . . seems limited to a single situation, namely, where the seller expressly gives a warranty for a period of time, such as guaranteeing a roof for twenty years."⁵⁶

One case that followed this narrow interpretation of the future performance exception was *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*,⁵⁷ in which the court held that an advertising claim by Johns-Manville that its roofs "are still performing satisfactorily after more than forty (40) years" could not be relied upon by Jones & Laughlin to create a warranty that would fit into the future performance category.⁵⁸ However, in *Parzek v. New England Log Homes, Inc.*,⁵⁹ a seller's statement that logs were treated with a preservative "to protect the treated wood against decay, stain, termites and other insects" was held to be within the exception since "the very nature of insect infestation, where the insects might not appear until several years after the infestation occurs, compels the conclusion that the warranty extended to future performance."⁶⁰ It is difficult to find any *explicit* warranty in this case.

Another example of conflicting holdings is found by comparing *Stumler v.*

50. *Id.*

51. *Id.* at 1185.

52. *Id.* at 1187.

53. Note, *supra* note 40, at 795-96.

54. 569 F. Supp. 1261 (D. Del. 1983).

55. *Id.* at 1266 (emphasis in original).

56. 3 W. HAWKLAND, *supra* note 10, at 480-81.

57. 626 F.2d 280 (3d Cir. 1980).

58. *Id.* at 291.

59. 92 A.D.2d 954, 460 N.Y.S.2d 698 (N.Y. App. Div. 1983).

60. *Id.* at 955, 460 N.Y.S.2d at 699.

*Ferry-Morse Seed Co.*⁶¹ with *Iowa Manufacturing Co. v. Joy Manufacturing Co.*⁶² *Stumler* involved a sale of tomato seeds. The plaintiff claimed that the seeds did not produce the type of tomatoes that the defendant had warranted that they would produce.⁶³ The Seventh Circuit Court of Appeals recognized that "because of the nature of seed, defects can only be ascertained after a growing period."⁶⁴ Nonetheless, the court held that "(s)ince that promised performance is not tied to any specific time period or future date, it is not a promise that falls within the exception to the general statute of limitations rule."⁶⁵ The court further explained that the "requirement of explicitness insures that the parties to the contract have knowingly agreed to alter the usual statute of limitations provided in the Uniform Commercial Code."⁶⁶ *Iowa Manufacturing Co.* involved the sale of pollution control equipment that was warranted to achieve specific emissions standards when operated in accordance with provided instructions.⁶⁷ The Supreme Court of Montana held that the warranty "necessarily contemplates a reasonable *period of performance* during which the defect or failure would manifest itself."⁶⁸ Thus, the court held that the statute ran from discovery and not from delivery.

In *Cuthbertson v. Clark Equipment Co.*,⁶⁹ the Supreme Judicial Court looked at the following warranty: "You have purchased this MICHIGAN Tractor Shovel with the expectation that it would give you long and faithful service. In its construction we have taken every precaution to see that you get an efficient, long lived, satisfactory machine."⁷⁰ This warranty was held not to fall within the future performance exception since the language did not refer to a specific future time.⁷¹ In *Mittasch v. Seal Lock Burial Vault, Inc.*,⁷² the New York Supreme Court held that a similar warranty did fit within the exception.⁷³ A warranty that a burial vault would give "satisfactory service at all times" extended to future performance since "the very nature of the product implies performance over an extended period of time."⁷⁴

As the *Parzek*, *Iowa Manufacturing Co.*, and *Mittasch* cases demonstrate, almost any express warranty can be made to fit within the future performance exception by a court that wants to use the date-of-discovery rule. To date, no court has held that an implied warranty fits within the exception, although one recent case comes very close to doing this. In *Moore v. Puget Sound Plywood, Inc.*,⁷⁵ the Supreme Court of Nebraska held that the future performance exception applied in a

61. 644 F.2d 667 (7th Cir. 1981).

62. Mont. 669 P.2d 1057 (Mont. 1983).

63. *Stumler v. Ferry-Morse Seed Co.*, 644 F.2d 667, 670 (7th Cir. 1981).

64. *Id.*

65. *Id.* at 672.

66. *Id.*

67. *Iowa Mfg. Co. v. Joy Mfg. Co.*, 669 P.2d 1057, 1060 (Mont. 1983).

68. *Id.* at 1060 (emphasis in original).

69. 448 A.2d 315 (Me. 1982).

70. *Id.* at 321.

71. *Id.*

72. 42 A.D.2d 573, 344 N.Y.S.2d 101 (N.Y. App. Div. 1973).

73. *Id.* at 574, 344 N.Y.S.2d at 103.

74. *Id.*

75. 214 Neb. 14, 332 N.W.2d 212 (1983).

breach of warranty action involving aluminum siding.⁷⁶ Thus, the action was allowed to proceed even though the action was filed eleven years after the siding was installed.⁷⁷ The plaintiff's complaint alleged that the defendant breached an implied warranty of merchantability.⁷⁸ The court nonetheless found a way to apply the future performance exception. First, it applied section 2-313(1)(b), which provides that "any description of goods which becomes a part of the basis of the bargain creates an express warranty that the goods shall conform to the description."⁷⁹ Thus, by calling the goods "siding," the seller was giving an express warranty.⁸⁰ Therefore, the court held that this warranty extended to future performance since "the description of the goods as 'siding' carried with it the representation that it would last the lifetime of the house."⁸¹

In applying subsection 2-725(2), courts face a problem: must the statute be followed precisely as it is written, or should the courts protect what is perceived to be the reasonable expectations of the contracting parties?⁸² Clearly, any statute that places courts in such a predicament needs to be changed. However, until such a change is accomplished, courts should follow the statute as it is written. One reason for this is that the legislature that enacts the statute weighs the various interests and develops public policy on a uniform basis. A court that ignores the legislature's legitimate commands is exceeding its powers. Also, only by applying the statute faithfully can the legislatures be shown the need for change. There is no legitimate reason for a court to give a purchaser a prospective warranty when the purchaser fails to negotiate for one.⁸³ After all, a purchaser who wants more than four years protection can bargain with the seller for an express warranty that is prospective.

V. THE CONTROVERSY OVER THE APPLICATION OF SECTION 2-725

Nowhere is the confusion surrounding section 2-725 more apparent than in an action to recover for personal injuries suffered as a result of using a defective product. The reason for this confusion is that plaintiffs usually have the choice of pursuing a recovery through strict liability or through a breach of warranty action. The Uniform Commercial Code provides for recovery of damages for personal injury in subsection 2-715(2).⁸⁴

76. *Id.* at 17, 332 N.W.2d at 215.

77. *Id.* at 16, 332 N.W.2d at 214.

78. U.C.C. § 2-314(1) (1978) provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Subsection (2)(c) further provides that "[g]oods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used."

79. *Moore v. Puget Sound Plywood, Inc.*, 214 Neb. 14, 17, 332 N.W.2d 212, 214-15 (1983).

80. *Id.* at 17, 332 N.W.2d at 214.

81. *Id.* at 17, 332 N.W.2d at 214-15.

82. *See supra* text accompanying notes 40-41.

83. *See supra* text following note 36.

84. U.C.C. § 2-715(2) (1978) provides in pertinent part: "(2) Consequential damages resulting from the seller's breach include . . . (b) injury to person or property proximately resulting from any breach of warranty."

A. The Choice

As one commentator has noted, "[t]he overwhelming amount of litigation involving the relationship between strict tort and UCC warranties has involved the statute of limitations."⁸⁵ Courts are faced with applying section 2-725 and its date-of-delivery rule or the tort statute of limitations and its date-of-discovery rule.⁸⁶ Courts have used different methods of making this choice:

Sometimes the courts allow a plaintiff to choose between them and to select the type of action which is most advantageous to him under the circumstances. At other times, they follow the gravamen theory, in which they select the principle thrust—the gist—of the action and thus make the selection for the plaintiff.⁸⁷

Tort statutes of limitations are usually only two years,⁸⁸ but because they run from the date of injury they can sometimes provide a longer period than does section 2-725. When the injury occurs more than two years from the date of delivery, courts may follow the tort period in order to give the plaintiff a longer time in which to bring an action.⁸⁹ Nonetheless, section 2-725 will in most cases provide a longer period within which to sue since most injuries caused by defects occur within two years of delivery.⁹⁰ The rule in some courts is that when there is substantial doubt as to which statute of limitations to apply, the longer period will be applied.⁹¹ Alabama has adopted a version of subsection 2-725(2) which provides that "a cause of action for damages for injury to the person in the case of consumer goods shall accrue when the injury occurs."⁹² This seems to alleviate the problem of which statute of limitations to apply. However, because it has been enacted by only one state, the provision tends to frustrate the uniformity that the Code seeks to achieve.⁹³

B. The Cases

It is often just as difficult to predict which statute of limitations will be applied as it is to predict whether or not a warranty will be labeled prospective. Cases with similar fact patterns often receive dissimilar treatment.

An example of dissimilar treatment despite similar fact patterns is the common situation of a plaintiff suing an automobile manufacturer for injuries sustained in an accident caused by a defect in the automobile. In *Hanson v. American Motors Corp.*,⁹⁴ the plaintiff's complaint alleged a breach of warranty. The claim arose after the plaintiff was injured in an automobile accident as a result of the failure of the

85. Shanker, *A Reexamination of Prosser's Products Liability Crossword Game: The Strict or Stricter Liability of Commercial Code Sales Warranty*, 29 CASE W. RES. L. REV. 550, 574 (1978-1979).

86. See *supra* text accompanying note 13.

87. Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123, 126 (1974).

88. Shanker, *supra* note 85, at 574.

89. J. WHITE & R. SUMMERS, *supra* note 11.

90. *Id.* at 416.

91. *Crawford County Trust & Savings Bank v. Crawford County, Iowa*, 66 F.2d 971, 973 (8th Cir. 1933), *cert. denied*, 291 U.S. 664 (1934).

92. ALA. CODE § 7-2-725(2) (1975).

93. See *supra* note 23 and accompanying text.

94. 83 Mich. App. 553, 269 N.W.2d 222 (1978).

automobile's steering gear assembly.⁹⁵ The court held that the tort statute of limitations would apply if "the cause of action arose out of the breach of an implied warranty," and section 2-725 would apply where the injury resulted from the breach of an express warranty.⁹⁶ The case was remanded to determine whether there was a specific contractual provision covering the steering mechanism.⁹⁷ A similar result was reached in *Witherspoon v. General Motors Corp.*,⁹⁸ in which the district court stated: "In the context of personal injury litigation involving defective products, a number of courts around the country have likewise applied the local statute of limitations for torts instead of the 4-year period prescribed by the U.C.C."⁹⁹ Again, the court was referring to an action for breach of an implied warranty.

A different result was reached in *Rothe v. Ford Motor Co.*,¹⁰⁰ where section 2-725 was applied to an action for breach of express and implied warranties. The court rejected prior case law that had applied the tort statute of limitations to actions for breach of implied warranties by stating that "the clear language of the Code . . . suggest(s) a contrary result."¹⁰¹

*Morton v. Texas Welding and Manufacturing Co.*¹⁰² is another illustration of how a court can manipulate statutes of limitations in order to allow a plaintiff's action to proceed. The case involved a propane truck explosion which gave rise to tort and breach of implied warranty claims. In that case, the claim was barred by the tort statute of limitations since the action was brought more than two years after the date of injury;¹⁰³ nonetheless, the case was allowed to proceed. The district court applied section 2-725, holding that the four-year period did not begin to run until the buyer discovered the breach.¹⁰⁴ Rather than hold section 2-725 inapplicable, the court chose to hold that an implied warranty fell within the future performance exception.

Not only is there disagreement among jurisdictions over which statute of limitations to apply in a given situation, but often the rule within a state remains uncertain until the supreme court of the state settles the matter. Three cases construing Pennsylvania law illustrate this problem. The first of these cases was *Patterson v. Her Majesty Industries, Inc.*,¹⁰⁵ in which the federal district court held that section 2-725 governed a breach of warranty action to recover for personal injuries. *Hahn v. Atlantic Richfield Co.*,¹⁰⁶ another example of a federal court interpreting Pennsylvania law, came along two years later. The Court of Appeals for the Third Circuit held that the tort statute of limitations applied to an action for breach of an implied warranty.¹⁰⁷ The court reasoned that "the concept of implying a warranty to extend liability to the

95. *Id.* at 554, 269 N.W.2d at 222.

96. *Id.* at 558, 269 N.W.2d at 224.

97. *Id.*

98. 535 F. Supp. 432 (W.D. Mo. 1982).

99. *Id.* at 434.

100. 531 F. Supp. 189 (N.D. Tex. 1981).

101. *Id.* at 194.

102. 408 F. Supp. 7 (S.D. Tex. 1976).

103. *Id.* at 9.

104. *Id.* at 11.

105. 450 F. Supp. 425 (E.D. Pa. 1978).

106. 625 F.2d 1095 (3d Cir. 1980).

107. *Id.* at 1100.

manufacturer of a defective product has been, from the outset, only a rather transparent device to accomplish the desired result of strict liability."¹⁰⁸ Finally, in *Williams v. West Penn Power Co.*,¹⁰⁹ the Supreme Court of Pennsylvania addressed the issue. The court adopted a pro-plaintiff position by holding that plaintiffs "have the option of proceeding in tort, governed by the tort statute of limitations, or under the Code, governed by the Code statute of limitations."¹¹⁰ This ruling means that sellers of goods in Pennsylvania will have to wait until both statutes of limitations expire before they are relieved of potential liability. Apparently, the only way to solve the applicability problem is to make the statutes more consistent.

VI. PROPOSAL TO AMEND SECTION 2-725

If the only problem involved in applying section 2-725 were whether a warranty extended to future performance, a simple change in the wording of the statute might suffice. This could be accomplished by specifying the precise language necessary to create a future performance warranty. However, because of the additional confusion surrounding the choice of the applicable statute of limitations, substantive changes in section 2-725 are necessary in order to end the confusion. As presently written, section 2-725 is not serving its stated purpose of providing "a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred."¹¹¹ Rather than introducing a uniform statute of limitations, section 2-725 has created great uncertainty. As Professors White and Summers have pointed out, "we can do little more than warn the lawyer not to make hasty judgments about the applicable statute of limitations or about when it will commence to run."¹¹²

In many instances, liberal construction of section 2-725(2) by the judiciary has failed to give effect to the general rule that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."¹¹³ Arguably, liberal construction has sometimes been contrary to the original expectations of the parties. By sometimes applying a tort statute of limitations to breach of warranty actions, courts have failed to adhere to the mandate that section 2-725 applies to "[a]n action for breach of any contract for sale."¹¹⁴ These observations are not intended as criticisms of the judiciary. Rather, they are pointed out to underscore the existing problems and to emphasize the need for change.

108. *Id.* at 1103. The court cited *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Restatement (Second) of Torts § 402A, comment m (1965); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 802 (1966).

109. 502 Pa. 557, 467 A.2d 811 (1983).

110. *Id.* at 570, 467 A.2d at 818.

111. U.C.C. § 2-725 official comments (1978).

112. J. WHITE & R. SUMMERS, *supra* note 11, at 420.

113. U.C.C. § 2-725(2) (1978).

114. *Id.* § 2-725(1).

Before proposing an amended version of section 2-725, it is important to set forth the policies that the proposed version should serve. First, and perhaps most importantly, the new section should protect the expectation interest¹¹⁵ of the contracting parties. However, the very nature of a statute of limitations is to cut off claims. Naturally, some of the expired claims will be valid and a party's expectation interest will be lost. What must be avoided is a statute of limitations that acts too harshly or that ignores commercial realities. Second, the new section should allow the parties freedom to contract as they wish. The current version of section 2-725 does a good job of this by allowing the parties in their original agreement to reduce the period of limitations to not less than one year,¹¹⁶ or by allowing them to extend the period, in effect, by using a future performance warranty.¹¹⁷

In addition to furthering these two policies, a proposed change must be examined closely to ensure that it is meeting the commercial needs of buyers and sellers. This should be a prime concern of any section of a commercial code. If courts feel that a section is failing in this area, they will find ways of circumventing the language of the section to achieve what is felt to be a fair result. The present wording of section 2-725 has created this type of situation.

In order to achieve a fairer statute that will promote uniformity, the following revised version of section 2-725 is proposed:

SECTION 2-725: STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE

- (1) An action for breach of any contract for sale must be commenced within two years after the claimant has discovered, or in the exercise of due diligence should have discovered the breach.
- (2) Except as provided in subsection (3), no action may be brought more than ten years from the time tender of delivery is made.
- (3) The ten year period provided in subsection (2) for bringing an action may be altered as follows:
 - a. if a seller expressly and explicitly warrants that its product can be utilized for a stated period longer than ten years, the period of repose shall be extended according to that warranty or promise;
 - b. by the original agreement the parties may reduce the period of repose provided in subsection (2) to a period not less than one year.
- (4) [Current § 2-725(3)] Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
- (5) [Current § 2-725(4)] This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

115. See *supra* note 35.

116. U.C.C. § 2-725(1) (1978).

117. U.C.C. § 2-725(1) prevents the parties from contractually creating a period of limitation in excess of four years. By using a future performance warranty, however, the parties can achieve this result by delaying the running of the four-year period.

It is readily conceded that the above proposal calls for a major substantive change in section 2-725. However, a change of this magnitude is needed in order to settle an area of law which has been the subject of much litigation. A substantial portion of the proposal is derived from the statute of limitations in the Model Uniform Product Liability Act.¹¹⁸ As a result, the proposed section 2-725 works like a tort statute of limitations.

Subsection (1) includes two major changes from the current statute. The most significant of these changes is that it adopts the date of discovery of the breach as the time when the statutory period will begin to run. This will prevent a buyer's action from being barred before the breach is discovered. This eliminates a major source of judicial dissatisfaction with the current statute. This subsection also prevents buyers from trying to take advantage of sellers by beginning the statutory period when the buyer "should have discovered the breach." Thus, a buyer cannot purposely remain blind to current defects and still have a right to bring a suit many years later. Also,

118. MODEL UNIFORM PRODUCT LIABILITY ACT, *supra* note 36, at § 110 provides:

(A) *Useful Safe Life.*

(1) Except as provided in Subsection (A)(2), a product seller shall not be subject to liability to a claimant for harm under this Act if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

"Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of Section 110, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

Examples of evidence that is especially probative in determining whether a product's useful safe life had expired include:

- (a) The amount of wear and tear to which the product had been subject;
- (b) The effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;
- (c) The normal practices of the user, similar users, and the product seller with respect to the circumstances, frequency, and purposes of the product's use, and with respect to repairs, renewals, and replacements;
- (d) Any representations, instructions, or warnings made by the product seller concerning proper maintenance, storage, and use of the product or the expected useful safe life of the product; and
- (e) Any modification or alteration of the product by a user or third party.

(2) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life to the extent that the product seller has expressly warranted the product for a longer period.

(B) *Statute of Repose.*

(1) *Generally.* In claims that involve harm caused more than ten (10) years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence.

(2) *Limitations on Statute of Repose.*

(a) If a product seller expressly warrants that its product can be utilized safely for a period longer than ten (10) years, the period of repose, after which the presumption created in Subsection (B)(1) arises, shall be extended according to that warranty or promise.

(b) The ten-(10-) year period of repose established in Subsection (B)(1) does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.

(c) Nothing contained in Subsection (B) shall affect the right of any person found liable under this Act to seek and obtain contribution or indemnity from any other person who is responsible for harm under this Act.

(d) The ten-(10-) year period of repose established in Subsection (B)(1) shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within ten (10) years after the time of delivery, did not manifest itself until after that time.

(c) *Statute of Limitation.* No claim under this Act may be brought more than two (2) years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and the cause thereof.

by simulating the statute of limitations used for product liability actions, it is hoped that courts will be more willing to apply section 2-725 in breach of warranty cases that involve personal injuries. This will promote the uniformity that the Code is intended to achieve.

One disadvantage of adopting the date-of-discovery rule is that sellers will not be certain how long they will be subject to liability and, in general, older actions will be permitted to be brought. Subsections (2) and (3) attempt to address these concerns directly by limiting the period of potential liability and by allowing the parties, in effect, to create their own limitation period. Sellers can hardly claim certainty under the present state of confusion. In any event, the benefits to be obtained by the proposed change outweigh any added inconveniences that sellers might suffer.

The other major change in subsection (1) is the reduction of the statutory period to two years. This appears to be a reasonable period in light of the fact that it will not begin to run until the breach is discovered. If a breach manifests itself within two years of tender of delivery then the period for bringing an action will actually be shorter than the present period.

Subsection (2) creates an outside limit of ten years in which a seller can be held liable for a breach. This type of limit is known as a statute of repose. The Model Uniform Product Liability Act identifies several reasons for having a statute of repose:

First, the fact that a product has been used safely for a substantial period of time is some indication that it was not defective at the time of delivery. Second, if a product seller is not aware of a claim, the passing of time may make it extremely difficult to construct a good defense because of the obstacle of securing evidence. . . . The third rationale is that persons ought to be allowed, as a matter of policy, to plan their affairs with a reasonable degree of certainty.¹¹⁹

The ten-year period of repose provided in subsection (2) is unlikely to create a hardship for consumers. A recent survey of product liability claims disclosed that over ninety-seven percent of product-related accidents occur within six years of the time the product was purchased.¹²⁰ Of the less than three percent of claims remaining, it is reasonable to assume that many of these were not the result of a breach by the seller, but were the result of misuse by the buyer. In the end, it must be remembered that all statutes of limitations cut off some valid claims.

Subsection (3) of the proposed statute modifies what might be considered harshness in the ten-year statute of repose. Subsection (3)(a) extends the ten-year period in a case in which a seller warrants its product for longer than ten years. Under this section, a buyer can receive a twenty-year warranty on a roof and rest assured that the statute of limitations will pose no problems if the roof only lasts fifteen years. It is important that the two-year period provided in subsection (1) is not changed by a warranty greater than ten years. Thus, if the roof begins to leak after three years, the buyer would then have only two years to bring suit. It is hoped that by requiring that a seller "expressly and explicitly" warrant its product "for a stated period longer than

119. *Id.* (analysis of § 110).

120. Massery, *Date-of-Sale Statutes of Limitations—A New Immunity for Product Suppliers*, 1977 *Ins. L.J.* 535, 542 n.40.

ten years," courts will strictly construe language in contracts so as not to extend the ten-year period except when it was clearly the intention of the parties to extend the period.¹²¹ Clearly, an implied warranty cannot pass this test.

Subsection (3)(b) was included for a seller that wishes to limit its liability, or needs to know exactly how long it will be subject to liability and how long it must keep its records. Subsection (3)(b) achieves the same result as the last sentence in the current subsection (1) of section 2-725. It allows the parties to limit contractually to one year the period in which to bring an action. This preserves the parties' freedom to contract, which is a goal of the Uniform Commercial Code.¹²² Subsection (3)(b) is important to sellers that do not want to be exposed to liability for a ten-year period. Courts, through the doctrine of unconscionability,¹²³ can police agreements to reduce the period of repose in order to assure that they are reasonable.

VII. CONCLUSION

Section 2-725 has not been successful in achieving its purpose of creating a uniform statute of limitations.¹²⁴ The future performance exception has given courts a means of manipulating section 2-725 to achieve the results they desire.¹²⁵ As a result, it is often difficult to predict when the statutory period has run.

This Note has set forth a proposed revision that will help to resolve the problems associated with section 2-725. The proposed revision is not the only way to resolve these problems. However, it does propose change in an area of law in which change is needed. It is hoped that this Note will stimulate the thought and motivation needed to achieve reform of section 2-725.

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121. *See supra* note 118.

122. *See* U.C.C. § 1-102(3) (1978).

123. U.C.C. § 2-302(1) (1978) provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

124. *See supra* text accompanying notes 111-12.

125. *See supra* text accompanying notes 56-82.